EXHIBIT 4
DATE 3/11/09
SB 357

May 30, 2008

The Honorable James Oberstar
United States House of Representatives
Washington, DC 20515

Dear Mr. Oberstar:

On behalf of 44 agriculture, recreation and natural resource industry organizations, we are writing in opposition to H.R. 2421 Clean Water Restoration Act of 2007 legislation. We understand and support the need for the Clean Water Act passed in 1972, but it is clear that Congress intended to use the term "navigable" to decipher which waters fall under federal jurisdiction. This term preserves a critical balance of power between the states and the federal government. Deleting the term "navigable" from the statute, as proposed in this bill, would call into question Montana's responsibility for land and water decision making. Montana has one of the most progressive and comprehensive sets of water quality law in the country, and we do not see the need for the federal government to step in and supersede those statutes.

The Environmental Protection Agency (EPA) has recognized Montana as the most proactive state in the nation when it comes to protecting and enhancing water quality. The State of Montana and proponents of H.R. 2421 fail to show current policy inadequacies or justification for this proposed legislation. We agree on the need to continue care for the quality of our Nation's waters, but expansion of federal jurisdiction is not necessary to accomplish this goal.

This legislation appears to be the result of previous Supreme Court rulings, which questioned the ability of the EPA and the U.S. Army Corps of Engineers to enforce the Clean Water Act on wetlands. Currently in Montana, the Montana Natural Heritage Program concluded "In the Northwestern Great Plains and Glaciated Plains, the majority of isolated wetlands are on private lands, and stewardship practices implemented on those wetlands have resulted in better conditions than are found on state and federal ownership."

Other wetland protections include, the Montana Department of Environmental Quality's (DEQ) Technical & Financial Assistance Bureau. It is responsible for coordinating and providing leadership to wetland conservation activities state-wide. One activity is to staff and provide leadership to the Montana Wetland Council. With DEQ leadership, the council developed a draft Conservation Strategy for Montana's Wetland and Situation Assessment, which guides the council in pursuing wetland conservation activities. Wetland conservation priorities are funded by an EPA grant program administered by the DEQ Wetland Coordinator. Instead of the increased regulations anticipated in this legislation, we view additional support or funding for these types of state programs as being more environmentally beneficial.

Montana currently has forty statutes that focus on water quality, two references in the Montana Constitution, and other numerous administrative rules. It is the public policy of our state to: (1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses; (2) provide a comprehensive program for the prevention, abatement, and control of water pollution; and (3) balance the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways with the policy of preventing, abating, and controlling water pollution.

In addition, the Conservation Districts oversee 310 permits, which include any private, nongovernmental individual or entity that proposes to work in or near a stream on public or private land. We are concerned this permitting process, which has been very effective, will be handed over to the EPA and Corps of Engineers. This will ultimately make the permitting process more lengthy and costly, and take decision making out of the state's hands.

Montanans are also concerned this legislation will include authority over state ground water policy and non-point source activities, affecting the Total Maximum Daily Load Program state reporting requirements, lead to expansion of citizen lawsuits and affect land use planning. Much of our concern over this bill also focuses on how courts will interpret the legislation. Courts will look to the findings in this bill, which are very expansive and broad. With this much interpretation to be made, we have no assurances that the savings clause will provide any protection.

We recommend that Congress work in partnership with the states, to build on successful programs and provide resources where help is desired. Montana, as well as many other states, has been very successful in addressing and improving water quality. We believe any effort to build on the success of the Clean Water Act needs to be developed from the ground up.

On behalf of our organizations, we urge you to not pass H.R. 2421 Clean Water Restoration Act of 2007.

Beartooth Snow Riders
Beaverhead Outdoor Association
Big Sky Snowriders
Billings Motorcycle Club
Bitterroot Ridgerunners Snowmobile Club
Citizens for Balanced Use
Families For Outdoor Recreation
Gallatin Valley Snowmobile Association
Great Falls Trail Bike Riders Association
Magic City 4-Wheelers
Midland Empire Snowmobile Association
Montana 4x4 Association
Montana Agricultural Business Association
Montana Association of State Grazing Districts
Montana Building Industry Association
Montana Coal Council
Montana Contractors' Association (AGC)

Montana Farm Bureau Federation
Montana Grain Growers Association
Montana Mining Association
Montana Motorsports Dealer Association
Montana Petroleum Association
Montana Powersports Dealers Association
Montana Public Lands Council
Montana Snowmobile Association
Montana Stockgrowers Association
Montana Trail Vehicle Riders Association
Montana Water Resources Association
Montana Wood Products Association
Montana Wool Growers Association
Montanans For Multiple Use
Montanans For Property Rights
National Off Highway Conservation Council
Park City Recreation Club
Prairie County Conservation District
Ravalli County Off Road User Association
Rimrock 4x4 Inc.
Snowmobile Alliance of Western States
Treasure State Alliance
Treasure State ATV Association
United Property Owners of Montana
Ward Irrigation District
Western Environmental Trade Association
Yellowstone Gold Prospectors Association of America

Cc: Senator Max Baucus
Senator Jon Tester
Congressman Dennis Rehberg
Governor Brian Schweitzer

Testimony on behalf of the

National Cattlemen's Beef Association

With regard to

The Clean Water Restoration Act

Submitted to the

United States Senate – Committee on Environment and Public Works

The Honorable Barbara Boxer, Chairwoman
The Honorable James Inhofe, Ranking Member

Submitted by

Randall Smith
Cattle Producer, Glen, Montana
Montana Stock Grower's Association
National Cattlemen's Beef Association

April 9, 2008

The Clean Water Act has been tremendously successful. It is arguably the most successful environmental law on the books. Millions of miles of rivers, lakes, streams, wetlands, estuaries, ponds, and other waters are cleaner and functioning appropriately thanks to the CWA. The Environmental Protection Agency's (EPA) most recent Water Quality Report to Congress indicates that approximately 59 percent of the waters assessed were fully meeting their designated uses. NCBA and MSGA support building on this success story with agriculture water quality programs that achieve and protect state designated uses, without being unreasonably burdensome on America's farmers and ranchers.

II. Congressional Intent

Since 1870, it has been well settled law that Congress' authority to regulate waterways is limited to regulating waters that could carry foreign or interstate commerce under the Commerce Clause of the U.S. Constitution. *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870). Thus, until recently, only waters that were navigable in fact, had been historically navigable, or were susceptible to navigation with reasonable improvement fell under federal jurisdiction, thereby excluding many wetlands. 39 Fed. Reg. 6113 (1974). It was not until 1968 that environmental and navigational factors began to be considered when determining federal jurisdiction. 33 CFR §209.120 (superseded by 72 Fed. Reg. 37, 133 (1977)).

With passage of the Clean Water Act in 1972, Congress acknowledged Constitutional limits and granted the federal government broad, but not unlimited, jurisdiction over our Nation's waters. There can be no clearer indication of Congressional intent with regard to the limits of federal jurisdiction than the fact that Congress used the term "navigable" repeatedly when establishing those limits and drafting and passing the CWA in 1972. If the term "navigable" meant nothing, the term would not have been used throughout the law. It is clear that Congress did not intend the CWA to regulate all waters of the United States. Rather, the stated goal of the CWA is to eliminate the discharge of pollutants into the Nation's "navigable" waters. Thus, Congress deliberately kept in place the constitutionally mandated system under which the states have "virtually plenary" authority to regulate intrastate, non-navigable waters. *California Oregon Power Co. v. Beaver Portland Cement Co.* U.S. (1935).

In fact, when the CWA was passed in 1972, Congress clearly recognized a partnership between the federal and state levels of government when it comes to protecting our waters. This recognition is set forth in Section 101(b) as follows:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."

CWA 101(b). It is this provision and the use of the word "navigable" throughout the CWA to describe federal jurisdiction that recognizes an essential dividing line between federal and state jurisdiction.

In 2001, the Supreme Court considered whether "isolated waters" or ponds that are not traditionally navigable or interstate, nor tributaries thereof, nor adjacent to any of these waters fall under federal jurisdiction if migratory birds land on them from time to time. The Court held that the use of isolated non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal CWA jurisdiction. *Solid Waste Agency of Northern Cook County v. United States Army corps of Engineers,* 531 U.S. 159, 166-174 (2001) (SWANCC).

In 2006, the Court again considered the meaning of the term "waters of the United States" in *Rapanos v. United States,* 126 S. Ct. 2208 (2006). The case involved whether federal CWA jurisdiction extends to pollutant discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters. *Id.* at 2219. In a plurality opinion, four Justices agreed that waters of the United States covers "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. *Id.* at 2225-2227. Justice Kennedy, concurring, determined that jurisdiction should include wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made," and "wetlands adjacent to navigable-in-fact waters." *Id.* at 2248.

It is not unreasonable, nor surprising, that the U.S. Supreme Court has extended CWA jurisdiction to some non-navigable waters, as discussed in the *SWANCC* and *Rapanos* decisions. In addition to expanding the reach of federal jurisdiction beyond truly navigable waters, the cases also provide a reasoned and thoughtful view of the limits of federal jurisdiction. Without such limits, federal jurisdiction would be boundless and would place an undue and unacceptable burden on the private property of cattle producers and others.

It is this kind of boundless jurisdiction that Senator Feingold's legislation would allow. There must be hundreds of millions of isolated, intrastate pools, ponds, and depressions filled with water on an intermittent basis, drainage and irrigation ditches, artificially irrigated areas, stock ponds, mud puddles, sloughs, and damp spots located on farm and ranch lands that are nowhere near any navigable waters, and provide very little if any environmental value. Surely, Senator Feingold understands and agrees that not all waters are the same in terms of their environmental function and value. To think that Senator Feingold intends to force farmers and ranchers to get section 404 permits whenever a cow or a plow affect one of these environmentally-insignificant waters is nothing less than shocking. Such an expansion of federal jurisdiction boggles the mind, is unwarranted, irrational, is not in the national interest, and would be disastrous for U.S. agriculture.

S. 1870 would result in the imposition of huge financial burdens on farmers and ranchers, would take away private property rights to the productive use of their land, and would do little to better our environment. It is one thing to regulate navigable waters and wetlands that have a "significant nexus" to those waters, because they have true environmental value. It is another thing to regulate every wet area simply because it is wet, regardless of the fact that these areas provide very little if any environmental value.

Once this program is given time to work, it can no longer be claimed that CAFOs are a concern with regard to water quality.

2. NPDES Permit Program

The EPA or states with authorized NPDES permitting programs may issue general or individual NPDES permits allowing the discharge of pollutants to surface waters of the United States as long as certain conditions are met. The Clean Water Act includes both technology-driven limits and water-quality-based limits on pollution. The technology-driven limits in the form of effluent limitations aim to prevent pollution by requiring the installation and implementation of various forms of technology designed to reduce discharges. These limitations are dictated by the more general "effluent limitations guidelines" (ELGs) which are separately promulgated by the EPA. An effluent limitation is "any restriction established . . . on the quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into . . . water." Water quality based regulations apply once a given body of water's pollution level exceeds the level that a state deems acceptable for the body of water's intended use or function. These regulations may ratchet up the pollution control required of individual polluters. Permits also include extensive reporting and recordkeeping requirements to help ensure compliance with effluent limitations.

In February 2003, the EPA updated and issued a final rule governing regulation of CAFOs under the NPDES permit program. After its release, a number of environmental and agricultural organizations separately appealed several aspects of the rule. The appeals were consolidated and heard by the Second Circuit Court of Appeals on December 13, 2004, and a final decision was issued on February 28, 2005. The decision overturned several aspects of the 2003 rules, upheld several other challenged provisions, and remanded other issues for further consideration by the EPA. In June 2006, the EPA released its proposed rule to address the 2nd Circuit decision; a final rule is expected to be released in July or August 2008. All newly regulated CAFOs are required to submit to the permitting authority an NPDES permit application and nutrient management plan by February 27, 2009.

The provisions that were either not litigated or were upheld in the final rule of 2003, taken together with the proposed rule issued in June 2006 provide for a comprehensive approach to regulating CAFOs under the Clean Water Act, and ensure that no production area discharges will occur except in the most extreme circumstances. The regulations impose a zero-discharge limitation on the production area of a CAFO by prohibiting the discharge of pollutants into waters of the United States, except in the event of discharges that might occur during the worst 24-hour storm in a 25-year period. For many producers, this requirement means spending hundreds of thousands of dollars to build basins around portions of their feedyards to catch any runoff.

In addition, the CAFO rule establishes non-numerical effluent limitations in the form of best management practices (BMPs) for the land application and production areas of CAFOs. BMPs are measures or methods that have been determined to be the most effective, practical means of preventing or reducing pollution from nonpoint sources. BMPs for the production area include daily and weekly inspections, maintenance of depth markers in lagoons to determine design

programs like these, to continue to produce our nation's food and fiber in an environmentally sound and sustainable way.

V. Property Rights Implications

Approximately 70 percent of the land in the lower 48 states is privately owned. A substantial portion of this land is used for the production of food which is arguably the most important use for this land. The production of food in our country cannot be taken for granted. In fact, farmers and ranchers in other countries are increasingly able to produce comparable food at lower cost to the American market. Additionally, society also looks to this private land and associated waters for many other services, including wildlife habitat, clean water, and open space, most notably. American producers face an ever tightening web of regulation which economically marginalizes an increasing number of operations. While many, if not all, of the environmental regulations are well-intended, it must also be recognized that limiting and ultimately choking the ability of farming and ranching operations to earn a living will come at a considerable cost to the entire nation.

The challenge for society in using private lands is to strike a sensible balance between the demands of food production and conservation of natural resources. Unfortunately, the United States through both Republican and Democratic administrations failed to strike a reasonable balance between protecting wet areas and respecting people who make their living on the land. Not only has no balance been struck, but in fact regulation has been allowed to proceed unlawfully and directly at odds with teachings from the leading Supreme Court cases on the issue. Fortunately, the Supreme Court provided a roadmap for resolving the situation in its recent decision in Rapanos v. United States, 126 S.Ct. 2208 (2006).